Supreme Court

JUN 10 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-6853

ALTON JAMES HENDERSON,

Petitioner,

-v.-

STATE OF NORTH CAROLINA,

Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

Petitioner's Motion to Grant Summarily, Vacate, and Remand

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On March 13, 1974, the Supreme Court of North Carolina affirmed petitioner's convictions and death sentences for rape and first degree burglary, and a petition for certiorari has been filed in this Court. Petitioner respectfully moves this Court to grant the petition summarily, vacate these judgments, and remand the case to the Supreme Court of North Carolina for consideration in the light of developments there subsequent to the affirmance of petitioner's convictions and death sentences.

1. At petitioner's trial, during the course of the jury's deliberations, the jury foreman returned to the courtroom and stated to the court that the jury "would like further instructions regarding the punishment and whether or not [it could] make a recommendation." R. at C. 19. The trial court, which had not informed the jury previously of the possible

punishment that could be imposed on petitioner if he were found guilty, replied:

> "I will instruct you the penalty [illegible] imposed is really not your concern. Your function is to pass on the guilt or not guilt [sic] as to both counts. So, I will not instruct you on what the penalty will be, that is not a concern of yours. As far as the recommendation is concerned, you cannot make a recommendation. You find him guilty or not guilty according to the evidence and the instructions I have given you."

at C. 19-C.20.

2. On appeal to the Supreme Court of North Carolina, petitioner urged that the trial court had erred by "[f]ailing to inform jury that verdict of guilty meant death." Brief of Appellant at 2. The Court rejected that claim, ruling that "[t]he sole responsibility of the jury is to decide the guilt or innocence of the accused without being hindered by the quantum of punishment possible, probable or certain upon conviction . . . . We hold that the trial judge properly refused to instruct the jury as to the punishment which would result from a conviction of rape or first degree burglary." State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10, 23 (1974).

3. Subsequent to the decision in petitioner's case, the Supreme Court of North Carolina considered a similar question in State v. Britt, No. 36 (Robeson County)(May 15, 1974)(appended to petition for certiorari as Appendix D), and came to an opposite result. In Britt, a homicide case where the trial court had not described the punishments which would be imposed subsequent to a conviction but had charged that it could convict

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of involuntary manslaughter, voluntary manslaughter, second degree murder, or first degree murder, the jury returned a verdict of "first-degree murder, with mercy" (slip opinion at 12). The trial judge refused to accept the recommendation of punishment and imposed the death sentence mandated in such cases by State v. Waddell, 282 N.C. 431, 194 S.E., 2d 19 (1973), ruling that:

> "This is not a possible verdict. The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of. The Court will not accept the recommendation of the Jury as to punishment in the matter, for punishment is entirely for the Court."

Slip opinion at 12. Appellant Britt assigned this ruling as error, and the Supreme Court of North Carolina agreed, reversing appellant's conviction and sentence of death and granting a new trial. The Court ruled that although State v. Waddell, supra, did not permit counsel to argue the issue of punishment to the jury, a jury's confusion about the punishment which could be imposed afforded a "compelling reason" for the trial judge to instruct the jury as to the consequences of a verdict that would result in a "mandatory" death penalty. The Court held that:

> "In (sic) instant case, when the jury returned a verdict of "first degree murder, with mercy", it became apparent that the jurors were confused as to the law and as to their duties as jurors. At that point the trial judge should have informed them that under existing law, neither the jury nor the court had any discretion as to punishment if the jury returned a verdict of guilty of first degree murder.....The gravity of this case, and the apparent confusion and uncertainty among the jurors when the unaccepted verdict was returned, demanded more clarification as to possible verdicts than the statement: 'The verdict must be either guilty of murder in the first degree or guilty of whatever you find him guilty of.'"

Slip opinion at 16-17.

4. In BRITT the jury came back with a recommendation of mercy and were told that punishment was none of their business. In HENDERSON the jury sent out a similar message asking whether they could make a recommendation and got the same answer. There is simply no way to distinguih BRITT from HENDERSON, and the Supreme Court of North Carolina did not attempt to. It stated that the result reached in this case now under Petition for Certiorari was the result of the "compelling reason" doctrine not being brought into focus:

> "We did not discuss the question of whether such compelling reasons existed as to require disclosure of punishment." (slip opinion p. 15)

And, although the court was too kind to say so, defendant would have been given a new trial below if counsel had spent less time arguing constitutional rights and more time seeking to accomodate, under the compelling reason doctrine, the FURMAN prohibition against jury discretion with the right of a juror not to take a life unknowingly.

5. The Supreme Court of North Carolina does not entertain rehearing petitions in criminal cases. State v. Council, 129 N.C. 511, 39 S.E. 814 (1901). Thus, at this stage of the proceedings, petitioner is unable to present the Supreme Court of North Carolina with the question of whether State v. Britt mandates a new trial for petitioner.

6. This petition presents important constitutional stions concerning the administration of criminal justice and the permissibility of imposing capital punishment. Since the Court has traditionally declined to "anticipate a question of constitutional law in advance of the necessity of deciding it," Liverpool Steamship Co. v. Emigration Commissioners, 113 U.S. 33, 39 (1885), it should avoid a premature consideration of these questions, when the grant of a new trial by the North Carolina Supreme Court might moot them. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-350 (1936) (Brandeis J. concurring).

7. There is clear precedent for the extraordinary action which petitioner requests. In Hunter v. Tennessee, 403 U.S. 711 (1971), the Court summarily granted four petitions for certiorari, vacated judgments of the Tennessee Supreme Court affirming death sentences for rape, and remanded the cases for reconsideration. While these cases were pending in the Tennessee Supreme Court, this Court had decided Witherspoon v. Illinois, 391 U.S. 510 (1968), but petitioners were unable to raise Witherspoon questions in the State supreme court because of Tennessee's appellate rules. While the cases were pending on certiorari, Tennessee amended these rules by statute, and this Court held that "sound judicial administration," 403 U.S. at 712, required that the petitions be granted and vacated summarily and the cases remanded to the Tennesse Supreme Court. The Court was careful, however, to intimate

no view on the merits of petitioners' claims or "as to the applicability of the new Tennessee statute to these cases." Ibid. Cf. Aikens v. California, 406 U.S. 813 (1972. For other cases in which this Court has summarily granted certiorari, vacated, and remanded, to allow a State Supreme Court to reconsider an issue in the light of a State law amendment subsequent to its decision in petitioner's case, see Watts v. Seward School Bd., 381 U.S. 126 (1965); Case v. Nebraska, 381 U.S. 336 (1965); Bell v. Maryland, 378 U.S. 226 (1964). Cf. Walton v. Arkansas, 371 U.S. 28 (1962).

8. The disposition petitioner requests is particularly appropriate in view of those cases where the Court has vacated and remanded for consideration of State law questions after granting certiorari, requiring the filing of briefs, and hearing oral argument. See Patterson v. Alabama, 294 U.S. 600 (1935); Williams v. Georgia, 349 U.S. 375 (1955). In Patterson v. Alabama, supra, at 607, this Court held that "in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered." See also Villa v. Van Schaick, 299 U.S. 152, 155 (1936). Efficient judicial administration requires that the Supreme Court of North Carolina now be afforded an opportunity to examine its decision in petitioner's case in light of its subsequent holding in Britt before further proceedings in this Court. See Smith v. Pennsylvania, 376 U.S.

354 (1964).

Conclusion

For the foregoing reasons, petitioner urges that the Court summarily grant the petition, vacate the judgment and remand to the Supreme Court of North Carolina for reconsideration.

Respectfully Submitted,

W. R. Dalton, Jr.

W. R. Dalton, Jr.
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that on this 7 day of June, 1974 I served 3 copies of the foregoing "Petitioner's Motion to Grant Summarily, Vacate and Remand" upon the Attorney General of North Carolina, the Hon. Robert Morgan, P. O. Box 629, Raleigh, North Carolina 27602 by depositing same in the United States mail, postage prepaid.

W. R. Dalton Jr.

W. R. Dalton, Jr., Esq.